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NO. _____

IN THE

**SUPREME COURT OF THE UNITED STATES**

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October Term, 1991

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PRINCE GEORGE'S COUNTY, MARYLAND,

Petitioner,

v.

ADA SANDRA KOPF, PERSONAL REPRESENTATIVE OF THE ESTATE OF ANTHONY JOHN CASELLA,

Respondent.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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# PETITION FOR WRIT OF CERTIORARI

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(301) 952-5237

Counsel of Record,

For Petitioner.

## QUESTION PRESENTED

I. WHETHER THE COURT OF APPEALS FAILED TO APPLY THE PROPER STANDARD FOR MUNICIPAL LIABILITY, FOR THE USE OF EXCESSIVE FORCE, UNDER 42 U.S.C. 1983, AS INTERPRETED BY THIS COURT IN CITY OF CANTON, OHIO V. HARRIS, ____ U.S. ____, 109 S.Ct. 1197 (1989)?

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Petitioner, Prince George's County, Maryland, requests that the Supreme Court of the United States grant a writ of certiorari to review the judgment and opinion of the United States Court of

Appeals for the Fourth Circuit, entered in the above-captioned proceeding on August 9, 1991.

## REFERENCE TO REPORTS OF OPINIONS OF OTHER COURTS IN THIS CASE

The prior opinions and decisions in this case are reported as: Kopf v. Wing, et al., 942 F.2d 265 (1991). (APX. 3).

## JURISDICTIONAL STATEMENT

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1). The judgment of the United States Court of Appeals for the Fourth Circuit for which Petitioner seeks review was entered on August 9, 1991. The Petitioner's Motion for a Rehearing and Suggestion for Rehearing in Banc, was denied on September 3, 1991. (APX. 1).

## PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. Amend IV: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. 1983: Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation

of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This action originated in the U.S. District Court for the District of Maryland pursuant to 28 U.S.C. 1331 and 42 U.S.C. 1983. Plaintiff filed Federal and State claims against individual police officers and the Petitioner, Prince George's County, Maryland alleging the use of excessive force in

effecting his arrest for armed robbery.[1] Plaintiff based his Section 1983 claim against the County on the County's alleged failure to maintain adequate internal checks on the use of excessive force, allowing it to become a pattern. The District Court granted all Defendants' Motions for Summary Judgment on the Federal claims and the State law claims were dismissed. (APX. 59). While acknowledging that the County's written standards for training, supervision and discipline are exemplary, the U.S. Fourth Circuit Court of Appeals

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[1] Anthony John Casella was originally the plaintiff in this action. He died on July 31, 1989, as a result of an attack upon him by a fellow inmate at the Patuxent Institution, where he was serving a seven year sentence for the robbery with a deadly weapon which occurred on February 21, 1988, and resulted in the incident which is the basis of this suit.

nevertheless reversed and remanded the case stating that if Plaintiff

> can prove the numerous instances of excessive force she alleges, in conjunction with the circumstantial evidence of a "circle the tents" approach to police brutality complaints, we think a fair-minded jury could find that the county has a custom or practice of letting incidents of excessive force go unpunished.

(APX. 17). Petitioner's Motion for Rehearing and Rehearing en Banc was denied. (APX. 1).

## ARGUMENT

### I. Introduction

The decision of the Fourth Circuit Court of Appeals in this case conflicts with the decisions of the Eighth, Seventh and Second circuits, which require a municipality to exhibit deliberate indifference to

constitutional rights before liability for its employees' actions may be imposed under 42 U.S.C. 1983. The decision also conflicts with this Court's reasoning in City of Canton, Ohio v. Harris, ___ U.S. ___, 109 S.Ct. 1197 (1989), which imposed the standard of deliberate indifference in a "failure to train" case. The extension of the application of the "deliberate indifference" standard in the instant case would create a uniform standard for municipal liability under 42 U.S.C. 1983 for police action, reduce confusion in the law and make clear that liability of counties under Section 1983 can not be based on respondeat superior.

It is necessary and important that this Petition for a Writ of Certiorari be granted because the Court of Appeals'

decision will prevent the resolution by summary judgment of the liability of any major police department in the United States. It will be virtually impossible for local governments to extricate themselves from Section 1983 litigation through preliminary motions to dismiss or pretrial motions for summary judgment.[2] The decision of the Court of Appeals will cause a substantial, unnecessary and burdensome increase in the workload of Federal trial courts because municipal liability could be predicated on unsubstantiated complaint statistics alone.

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[2] The following organizations join as amici in this petition: Anne Arundel County, Maryland, the Maryland Association of Counties (MACO) and the National Institute of Municipal Law Officers (NIMLO).

The statistics in question reflect the minimal percentage of excessive force complaints sustained through internal investigation as opposed to the percentage of other citizen complaints sustained through similar procedures. Accordingly, to survive a preliminary or properly supported pretrial motion, a plaintiff need only allege the existence of or to actually provide general statistics showing that a municipality sustains a minimal percentage of the excessive force complaints actually made against its police department. The decision thereby subverts the bases for filing preliminary or pretrial motions and subjects local governments to even more protracted and costly litigation than is currently seen under Section 1983. This Court should clarify that,

in order to hold a municipality liable as a "person" under 1983, there must be proof of "deliberate indifference" and it must be more than the bare statistical allegations asserted here.

## II. A Municipality Must Exhibit Deliberate Indifference To Constitutional Rights In Order To Be Held Liable Under 42 U.S.C. Section 1983.

The question of municipal liability for constitutional violations was addressed by this Court in Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978). The Monell Court determined that Congress did not intend that a municipality be held vicariously liable for the tortious conduct of its employees. In order to be held liable as a person under 42 U.S.C. 1983, the municipality must have caused the injury, it must be at fault. In this

case, the trial court found that there was no County policy, custom or usage which directly commanded the officers to commit constitutional violations; that the individual defendants were not inadequately trained; and that the County did not condone or foster a custom or usage which encouraged the use of excessive force in situations such as the one which arose here. The Fourth Circuit Court of Appeals also found that the County's written "standard" policies are exemplary.

The standard for municipal liability was most recently enunciated by this Court in City of Canton, Ohio v. Harris, ___ U.S. ___, 109 S.Ct. 1197, 1204 (1989). In City of Canton, this Court held that a municipality may be held liable for its omissions even when

its official policy is unassailable on its face. But the degree of fault must be more than negligence, it must be the equivalent of deliberate indifference.

The first question is whether the disciplinary procedure is adequate. City of Canton, 109 S.Ct. at 1205. In this case, there was uncontroverted evidence that all complaints of the use of excessive force are processed and retained in accordance with Maryland State law and investigated by experienced officers using an established and detailed format. If the allegations of a complaint are sustained, the officer is disciplined.

The next question is whether the inadequacy of the procedure can justifiably be said to represent "city policy". 109 S.Ct. at 1205. The need

for more or different discipline must be "so obvious" and "the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." 109 S.Ct. at 1205. Mere negligence in the administration of an otherwise sound program will not suffice. 109 S.Ct. at 1206. A lesser standard of fault and causation would expose municipalities to unprecedented liability resulting in de facto respondeat superior liability. 109 S.Ct. at 1206.

Although City of Canton involved a "failure to train" claim, the "deliberate indifference" standard should also be applied when the claim is for failure to discipline. Neither does

it matter what the underlying constitutional claim is. 109 S.Ct. at 1204, n.8. Other Circuit Courts of Appeals have applied the standard of "deliberate indifference." Thelma D. By Delores A. v. Board of Educ., 934 F.2d 929 (8th Cir. 1991); Gibson v. City of Chicago, 910 F.2d 1510 (7th Cir. 1990); Fiacco v. City of Rensselaer, N.Y., 783 F.2d 319, 329-330 (2nd Cir. 1986), cert. denied, 480 U.S. 922 (1987).

The Fourth Circuit did not apply this standard. The Court did not require evidence of deliberate indifference. The Fourth Circuit sanctioned an improper means of inferring the existence of a municipal policy or custom under Section 1983. The decision of the Fourth Circuit will make it much easier for plaintiffs to

allege and create inferences as to the existence of municipal policies or customs where, in fact, none exist.

Specifically, in reversing the entry of judgment in favor of the municipality, the Fourth Circuit relies on the general statistics supplied by Plaintiff, despite the fact that there is no evidence that any of the unsustained complaints actually had merit and that such complaints were not adequately investigated. Without supportive evidence, the court deems the statistics, inter alia, to be "circumstantial evidence of a 'circle the tents' approach to police brutality complaints" from which a "fair-minded jury could find that the county has a custom or practice of letting incidents of excessive force go unpunished."

(APX. 17). In reaching its decision, the Fourth Circuit fails to cite any other judicial opinion which has adopted such an approach. Nevertheless, the Court concludes that the presentation of general statistics, in the absence of evidence for such statistics to corroborate, is sufficient to subject a municipality to trial and the risks inherent therein. This is simply insufficient to sustain municipal liability under 42 USC 1983. The Court's decision is in conflict with the other Circuits and with this Court's opinion in City of Canton.

III. Complaint Statistics Alone Are Insufficient to Create an Issue of Municipal Liability Under 42 U.S.C. 1983

The City of Canton Court gave an example of the type of failure which

could be characterized as "deliberate indifference" to constitutional rights. If,

> ... the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policy makers, who, nevertheless, are "deliberately indifferent" to the need. (emphasis added).

109 S.Ct. at 1205, n.10.

The issue presented in the present case is to what extent general statistics, specifically those concerning citizen complaints of excessive force, can be used to establish the existence of such policy, custom or usage. Plaintiff introduced into evidence 17 complaints filed with the Internal Affairs Section of the Police Department and the County Human

Relations Commission. If such evidence is enough to establish a policy of deliberate indifference on the part of the municipal policymaker, it will become practically impossible for any major police department to prove by summary judgment that it does not have a policy of encouraging the excessive use of force since any number of complaints will become a jury question. Further, the Petitioner has a practice of encouraging the filing of such complaints which under the reasoning of the Court of Appeals for the Fourth Circuit may be adverse to its financial interest. Plaintiff nowhere asserts that she has any independent proof of these incidents. Nor does Plaintiff have any other evidence of a pattern of use of excessive force. Plaintiff's

allegation of a pattern of excessive force rests solely on the theory that a certain number of unsubstantiated complaints constitute such a pattern. These statistics are simply insufficient to allow a finding of a pattern of excessive use of force. Just as these statistics cannot prove a pattern of unconstitutional behavior, neither can they inform the municipal policymakers that such a pattern exists. Rizzo v. Goode, 423 U.S. 362, 373-374 (1976).

Although predating the decision in Monell, this Court's decision in Rizzo v. Goode, 423 U.S. 362 (1975), discussed the difficulties of relying on statistics to establish a pattern of municipal misconduct. In Rizzo, after parallel trials of separate actions brought pursuant to Section 1983, the

district court adduced a pattern of frequent police violations of constitutional rights based on 20 incidents in a city of three million inhabitants with 7,500 policemen. Id. at 368-376. Accordingly, the district court entered an order requiring petitioners to submit a comprehensive plan for improving the handling of citizen complaints alleging police misconduct. Id. at 365. The proposed program was subsequently incorporated into a final judgment. Id. The Court of Appeals for the Third Circuit affirmed the district court's choice of equitable relief. Id. at 366. This Court granted certiorari to consider petitioners' claims that the judgment of the district court represented an unwarranted intrusion by the federal

judiciary into the discretionary authority committed to them by state and local law to perform their official functions. Id.

In agreeing with petitioners and reversing the judgment of the court of appeals, this Court rejected respondents' contention that the number of incidents was "unacceptably high" or that the number of incidents established a pattern of frequent police violations, warranting injunctive relief. Id. at 375. The court stated as follows:

> However, there was no showing that the behavior of the Philadelphia police was different in kind or degree from that which exists elsewhere; indeed,the District Court found 'that the problems disclosed by the record . . . are fairly typical of [those] afflicting police department in major urban areas.' Ibid. Thus, invocation of the word 'pattern' in a case where,

> unlike Hague [v. CIO, 307 U.S. 496 (1939)] and [Allee v.] Medrano [, 416 U.S. 802 (1974),] the defendants are not casually linked to it, is but a distant echo of the findings in those cases. The focus in Hague and Medrano was not simply on the number of violations which occurred but on the common thread running through them: a 'pervasive pattern of intimidation' flowing from a deliberate plan by the named defendants to crush the nascent labor organizations. Medrano, supra, at 812. The District Court's unadorned finding of a statistical pattern is quite dissimilar to the factual settings of these two cases.

Id. (Emphasis in original). In essence, this Court implied that general statistics, in and of themselves, were probative of nothing.

Since Monell, the issues concerning the use of statistics have been most frequently debated in the Seventh Circuit. In Ekergren v. City of

Chicago, 538 F.Supp. 770 (N.D.Ill. 1982), the district court examined whether the number of civil rights cases filed against Chicago policeman sufficiently identified a pattern or series of unconstitutional acts to raise the inference that there existed a municipal policy condoning such actions. In answering the question in the negative, and thereby granting the city's motion to dismiss, the district court stated as follows:

> Initially, the court notes that the number of suits filed by itself is insufficient, as a certain proportion of those suits may be groundless and in others the defendants may prevail. The primary defect with plaintiff's allegations, however, is a lack of specificity; the number of civil rights cases is not relevant, only the number of civil rights cases against

> Chicago policemen involving unlawful arrests, searches and seizures.
>
> Furthermore, because the area of arrests, searches and seizures includes an almost limitless range of factual situations, the court is of the opinion that even if plaintiff alleged in detail the number of illegal arrests or search and seizure cases in which the plaintiffs prevailed, this would not establish a pattern.

Id. at 773.

The reasoning in Ekergren was later adopted by the Court of Appeals for the Seventh Circuit in Strauss v. City of Chicago, 760 F.2d 765 (7th Cir. 1985). In Strauss, the court of appeals affirmed the district court's dismissal of the complaint for failure to state a claim upon which relief could be granted. The plaintiff had attempted to establish the minimal facts required to

allege the existence of municipal policy by including statistical summaries from the Office of Professional Standards regarding complaints filed with the police department. Id. at 768. The plaintiff suggested that the police department's sustaining only six to seven percent of all registered complaints filed for 1977, 1978 and 1979 '[gave] rise to a reasonable man's suspicions that defendant Chicago's methods of review are weighted to discourage positive findings." Id. In rejecting such reasoning as "specious," the court of appeals made the following observations:

> . . . the number of complaints filed, without more, indicates nothing. People may file a complaint for many reasons, or

> for no reason at all. That they filed complaints does not indicate that the policies that [plaintiff] alleges exist do in fact exist and did contribute to his injury.

Id. at 768-769. As in Ekergren, the court found that the data presented "represent[ed] nothing more than generalized allegations bearing no relation to [plaintiff's] injury." Id. at 769.

In the instant case, Plaintiff seeks to establish that the County condoned the alleged pattern by introducing evidence that a smaller percentage of complaints of excessive force complaints were sustained than

other complaints of misconduct.[3] Plaintiff asserts that this is evidence that the complaints were not handled properly, leading police officers to believe that incidents of excessive force would go unpunished and encouraging the use of excessive force. This statistical comparison has absolutely no probative value. Plaintiff has not shown that any complaint was not thoroughly investigated and fairly adjudicated. In Bryant v. Whalen, 759 F.Supp. 410 (N.D.

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[3] Other conduct which Plaintiff cites in support of its allegations that the Petitioner failed to stop the alleged pattern of abuse are the destruction of preliminary incident reports of excessive force after six months and the failure to take pictures of dog bites. However, all information contained in the preliminary reports which is pertinent to an ongoing investigation and all pertinent medical information about the dog bites is retained.)

Ill. 1991), the court provided a cogent explanation of why such a low percentage of excessive force complaints is sustained. The court stated as follows:

> Investigations are conducted by trained staff-members with degrees in criminal justice or related fields. These investigations involve comprehensive quantifications of the evidence relating to a complaint into four categories: unfounded, exonerated, not sustained, and sustained. These categories each relate to a differing degree of likelihood that an incident actually occurred. Beyond [the Office of Professional Standards], excessive force complaints are subject to additional levels of review, whether within the police department or at a civilian level.

Id. at 424.

This type of statistical evidence is insufficient to establish the necessary degree of fault, that of "deliberent indifference." The Fourth Circuits'

decision conflicts with other Circuit Courts of Appeals. Fiacco v. City of Rensselaer, N.Y., 783 F.2d 319, 329-330 (2nd Cir. 1986), cert. denied, 480 U.S. 922 (1987) (there were no complaint forms available to civilians, the administrative board failed to hold any hearings on the complaints and the five most recent complaints of excessive force were deliberately ignored by the Chief of Police); Thelma D. By Delores A. v. Board of Educ., 934 F.2d 929, 933 (8th Cir. 1991) (five complaints against individual scattered over sixteen years cannot comprise a persistent and widespread pattern of unconstitutional misconduct); Strauss v. City of Chicago, supra, 760 F.2d 765, 769 (7th Cir. 1985) (The number of complaints filed is indicative of nothing.)

## CONCLUSION

This Petition should be granted because of the extraordinary and unnecessary burden the decision of the Court of Appeals will place on federal trial courts and municipalites, and its conflict with the decisions of other Circuits and with this Court's reasoning in City of Canton. If the use of general statistics alone is permitted to either allege or infer the existence of a municipal police or custom, municipalities will certainly be subjected to more protracted and expensive litigation than is currently seen under Section 1983. The latter approach will subject municipalities to trial in virtually every case as, in reality, the percentage of sustained excessive force complaints is always

drastically lower than the percentage of other police misconduct complaints. The Court of Appeals erred by not requiring proof of "deliberate indifference" to constitutional rights as the substantive standard for municipal liability under 42 U.S.C. 1983.

Respectfully submitted,

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COUNSEL OF RECORD
FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of this Petition were mailed first-class, postage prepaid on this 2nd day of January, 1992 to Terrell N.

Roberts, III, Esquire, 6801 Kenilworth Avenue, Suite 202, Berkshire Building, Riverdale, MD 20737.

Michael O. Connaughton

UNITED STATES SCOURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
September 3, 1991

No. 90-2462

ADA SANDRA KOPF, Personal Representative of the Estate of Anthony John Casella

Plaintiff - Appellant

v.

JOSEPH P. WING, Corporal; STEVEN KERPELMAN, Corporal; JAMES SKYRM; PRINCE GEORGE'S COUNTY, MARYLAND, a body corporate and politic;

Defendants - Appellees

and

OTHER UNKNOWN OFFICERS OF THE PRINCE GEORGE'S COUNTY POLICE DEPARTMENT

Defendant

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On Petition for Rehearing with Suggestion for Rehearing in Banc

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Appellee filed a petition for rehearing with suggestion for rehearing in banc. No member of the Court

requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Hall, with the concurrence of Judge Ervin and Judge Kellam.

For the Court,

_____

CLERK

**PUBLISHED**

**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

ADA SANDRA KOPF, Personal Representative of the Estate of Anthony John Casella,
Plaintiff-Appellant,

v.

JOSEPH P. WING, Corporal; STEVEN KERPELMAN, Corporal; JAMES SKYRM; PRINCE GEORGE'S COUNTY, MARYLAND, a body corporate and politic,
Defendants-Appellees,

and

OTHER UNKNOWN OFFICERS OF THE PRINCE GEORGE'S COUNTY POLICE DEPARTMENT,
Defendants.

No. 90-2462

Appeal from the United States District Court for the District of Maryland, at Baltimore.
Alexander Harvey, II, Senior District Judge.
(CA-89-539-H)

Argued: May 8, 1991

Decided: August 9, 1991

Before ERVIN, Chief Judge, HALL, Circuit Judge, and KELLAM, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Reversed and remanded by published opinion. Judge Hall wrote the opinion, in which Chief Judge Ervin and Senior Judge Kellam Joined.

**COUNSEL**

**ARGUED:** Terrell Non Roberts, III, ROBERTS & WOOD, Riverdale, Maryland, for Appellant. Sean D. Wallace, Michael O Connaughton, Upper Marlboro, Maryland, for Appellees. **ON BRIEF:** Michael P. Whalen, Alan E. D'Appolito, S. Daniel Wallace, Upper Marlboro, Maryland, for Appellees.

OPINION.

HALL, Circuit Judge:

Ada Kopf, personal representative of the estate of Anthony Casella, appeals the district court's grant of summary judgment to defendants, police officers and county, in Casella's Section 1983 action alleging excessive use of force in making an arrest. Because we find that the appellant made a sufficient showing to survive summary judgment, we reverse and remand.

I.

Reciting the facts of this case is no easy task. The parties' competing renditions hardly coincide. In the following narrative, we attempt to identify disputed or unilateral assertions of fact as such.

At midnight on February 21, 1988, police received a report of the armed robbery of a carry-out pizza shop in Hyattsville, Maryland, by a white male with a handgun. On hundred dollars had been stolen. Witnesses had recorded the license number of the van in which the perpetrator had fled, and a bulletin was promptly broadcast to all local police.

Within minutes, two Hyattsville city officers spotted the van and gave chase. The van stopped, and the three occupants - Joseph Corcoran, age 29; Tammy Obloy, age 17 and four months pregnant; and Anthony Casella, age 19 - fled on foot. Corcoran fell, injured his leg, and was quickly apprehended. Corcoran had thrown the gun out of the window of the van; however, when a search of Corcoran and the van failed to

uncover the gun, officers concluded that the remaining suspects might have it. Casella and Obloy hid behind a shed in the back yard of a house in the residential neighborhood. This hiding place was an extremely narrow passage between the shed's wall and the fence. Photographs of it were before the district court.

More officers, county and city, arrived. Among them was appellee Joe Wing with his Prince George's County canine unit dog, "Iron." He made one unsuccessful track around the neighborhood with Iron, but, on a second try, Iron located Casella and Obloy behind the shed.

Wind testified on deposition that, in an "extremely" loud voice, he warned the suspects that they should come out

or he would release the dog. Obloy testified that she heard no such warning. No civilian witness heard it, though they heard other aspects of the incident. Wing's loud warning was, however, heard by other police officers.

Wing released Iron. Iron ran to the rear of the shed and entered the passage from the west side. Wing followed; when he reached the corner of the shed, he shined his flashlight and saw Iron encounter Casella and Obloy. Obloy was closer, and Iron bit her first. Casella kicked the dog to try to make it stop biting. According to Obloy, Casella yelled to the officers that Obloy was pregnant and to get the dog off of her. Wiing tried to get into the passage, but he could not because of a post that blocked the way. Wing

stated that he repeatedly told the two to raise their hands, but they did not. Iron released Obloy's leg and began biting Casella.

At this point, appellees Steven Kerpelman and James Skyrm, also county policeman, entered the defile from the east side, which was blocked by a woodpile but was not so inaccessible as the west entry. Kerpelman and Skyrm grabbed Casella, and the dog continued to bite. Wing did not order Iron to release; instead, noting that Casella had no weapon in his hands, Wing ran back around the shed to assist Kerpelman and Skyrm.

Casella struggled with the dog, Kerpelman and Skyrm. By this time, Iron was biting Casella in the thigh and groin; still Wing allowed the biting to

go on. Casella was kicking the dog and flailing his arms at the officers. He struck Wing, who responded with a blackjack blow to Casella's head, or, as Wing put it at deposition, the "upper head body area." Wing states that he picked Obloy up and lifted her across the other people and the woodpile to an officer outside the defile in the yard. Wing acknowledged that Iron was still biting Casella in the "upper thigh, groin area," but he only ordered Iron to release after Obloy was removed. Both Kerpelman and Skyrm stated that Skyrm, not Wing, had thrown Obloy over the woodpile.

Kerpelman and Skyrm were meanwhile struggling with Casella, who was in a hunched-over position between standing and kneeling. Kerpelman saw Casella

"lunge" toward Skyrm, barely missing Skyrm's gun, and Kerpelman assumed that Casella was trying to get the gun. Skyrm responded by striking Casella with his blackjack, intending, he stated, to strike in the clavicle. Though Casella was flailing his arms and sometimes striking the officers, Kerpelman and Skyrm managed to grab his shoulder and tried to pull him from the defile. Casella's jacket came off instead, and money fell out of it. On their second try, Skyrm and Kerpelman were able to pull Casella out. During the struggle, Kerpelman struck Casella in the "upper body" with his flashlight "once, maybe twice" with enough force to break the flashlight. He did not remember if he delivered these blows before or after the officers had pulled Casella into the

yard. His flashlight broken, Kerpelman then struck Casella "once or twice" in "the upper torso" with his blackjack. He admitted that these blows were inflicted after Casella had been removed from the defile.

Casella was subdued in the yard by all three officers. Contrary to Kerpelman, Skyrm stated that no one struck Casella after he was removed from behind the shed.

Obloy testified that Casella did not resist arrest. Rather, he tried to get Iron off of her, and a policeman said "don't touch my dog" in a "real angry voice" and then struck Casella in the head with a "nightstick thing."

Daniel Stroup, whose backyard abutted the fence behind the shed, was one hundred feet away during the

incident. He did not hear any announcement that Wing was going to release the dog, though he saw it released and then heard Obloy scream. Stroup looked at the scene the next day; he saw blood out in the yard, but not behind the shed. Robert Reymer was standing on a corner across the street. He heard no announcement, but he also heard Obloy's scream. In addition, he testified that he could hear a "constant poom, poom, poom, like being punched or hit," which lasted "approximately one minute."

Casella was taken by ambulance to a local hospital. He was frightfully mauled. He was rambling senselessly, which the police attributed to use of drugs rather that Casella's head injuries. A drug test was negative. He

had four scalp lacerations, a fractured skull, and a subdural hematoma.

Iron had left his marks, too. Casella had lacerations of the upper lip, chest, knee, leg, and scrotum. He was listed in critical condition, and underwent cranial surgery that night. Photographs of some of Casella's injuries, after treatment, were also before the district court.

Fully two weeks later, on March 4, 1988, Casella was still confused and incoherent, suffering from "traumatic aphasia."[1] He was not released from the hospital until March 28, 1988. He later pled guilty to armed robbery and was sentenced to seven years in state prison.

On February 21, 1989, Casella filed this suit in district court against Wing, Kerpelman, Skyrm, and Prince George's County. His federal claims rested upon 42 U.S.C. Section 1983, and he asserted pendent state law claims for battery, negligence, and negligent hiring and training. On July 31, 1989, before his testimony could be recorded, Casella was killed in a prison fight.

[1]Aphasia is a loss or impairment of the ability to use words.

His mother, Ada Kopf, as his personal representative, was substituted as plaintiff.

On March 21, 1990, the officers and county moved for summary judgment. The appellant opposed the motion. After a hearing, the district court granted the motion on August 7, 1990. Kopf appeals.

II.

"Objective reasonableness: is the test to determine whether a particular use of force to effect an arrest is excessive. Graham v. Connor, 490 U.S. 386 (1989).

> The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . .The calculus of

> reasonableness must embody allowance for the fact that police officers are often required to make split-second judgments-in circumstances that are tense, uncertain, and rapidly evolving-about the amount of force that is necessary in a particular situation.

Id. at 396-397.

This substantive law must, in this case, be applied in the context of a motion for summary judgment. Anderson v. Liberty Lobby, 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Did appellant come forward with enough proof in support of the claim that a fair-minded jury could find that the degree of force used against Casella

was not "objectively reasonable?" We think that she did.

First of all, the district court resolved some disputes of material fact on summary judgment, where it should have assumed appellant's version as true. For example, the court's opinion states that "Defendant Wing. . . announced in a loud voice the presence of the K-9 dog and called on the suspects to surrender." Neither Obloy nor any civilian witness heard the announcement; only police officers testified that it was given. Appellant argues that this factual dispute is crucial, because a forewarning that the dog is going to attack, which provides the suspects a fair chance to surrender, is more reasonable than a surprise assault.

Moreover, appellant provided affidavits from well-credentialed experts on the use of canine units, both of whom were of the opinion that use of the dog when the suspects were surrounded was unreasonable, announcements notwithstanding. Thomas Knott, a retired canine unit trainer for the Baltimore city police, stated that release of a dog without allowing time for the suspects to give up, especially where the suspects were cornered and escaped impossible, was unreasonable. The primary purpose of a police dog, according to Knott, is to locate suspects, not to bite them. Knott's opinion was corroborated by the affidavit of Robert diGrazia, former Montgomery County, Maryland, Chief of Police, and former Police Commissioner

of Boston and St. Louis. DiGrazia stated that the release of Iron was "contrary to any legitimate purpose for the use of the dog." Appellees respond that because they feared that the suspects were armed, it was reasonable to subject Iron to the danger of getting shot before committing an officer.

The district court also found that Casella refused to surrender, though called upon to do so; again, whether the announcement was actually made is a material dispute. The court faulted Casella for fighting with the dog rather than surrendering. We believe that a jury could find it objectively unreasonable to require someone to put his hands up and calmly surrender while a police dog bites him scrotum.

The district court also assumed that Casella fought with the officers and that all of the head blows were inflicted while Casella struggled. Obloy disputed this, and Kerpelman's deposition testimony admits that Casella's flailing about may have been simply his fighting with the dog. Kerpelman received a single cut on the forehead (which was mended with a Bandaid). Neither Wing nor Skyrm was injured. Appellant would from this lack of harm infer that Casella's "fighting" with the officers was exaggerated; we believe that a reasonable jury could make the same inference.

The district court also took into account that the officers reasonably believed that Casella had the gun that had been used in the robbery. Though

this belief, which we think was reasonable, might have some bearing on sending in Iron before exposing an officer, the officers quickly saw that Casella's hands were empty and did not then fear the presence of a weapon, as is evidenced by the their holstering of their own guns and putting themselves in close proximity to Casella.

Appellant emphasizes some aspects of the officers' testimony that detract from their credibility, or at least could justify a reasonable jury so finding. Wing and Skyrm would have the altercation with Casella, and all blows inflicted on him, occur in the narrow passage behind the shed. Kerpelman, on the other hand, admitted that he had struck Casella in the yard outside the defile. A civilian witness saw blood

only in the yard. We have examined the photographs of the passage, and must strain to find room for five adults and a dog to stand, let alone to fight, swing a blackjack, or lunge for a gun. The location of the struggle is important because the officers emphasize the dark, "close quarters" nature of the arrest scene. In addition, appellant points out that the officers gave inconsistent testimony as to who removed Obloy from the hiding place.

Finally, even if it found that force was necessary to arrest Casella, a reasonable jury could nonetheless find the degree of force excessive. The only blackjack-inflicted lacerations were on Casella's head. There is no medical evidence that he was struck anywhere else, though none of the officers

admitted intending to strike him on the head.

Casella was nearly beaten to death. There are, perhaps, occasions when such a severe degree of force is objectively reasonable. However, summary judgment is appropriate only if the undisputed facts portray an extraordinary situation that justified the extraordinary force. They do not in this case.

We reverse the summary judgment for the appellee officers.

III.

The county's Section 1983 liability is derivative of, but narrower than, the officers'. Appellant can prevail only if excessive force was used against Casella, and this use of force was caused by an unconstitutional custom or practice of the county. Spell v.

McDaniel, 824 F.2d 1380 (5th Cir. 1987), cert. denied, 484 U.S. 1027 (1988). Of course, written policies are carefully crafted to be constitutional, and a plaintiff must usually prove the existence of some unpublished practice. In the police brutality context, two theories predominate:

> The principal theory locates fault in deficient programs in police training and supervision which are claimed to have resulted in constitutional violations by untrained or mistrained police officers. A second theory, sometimes imprecisely subsumed under the first, locates fault in irresponsible failure by municipal policymakers to put a

> stop to or correct a widespread pattern of unconstitutional conduct by police officers of which the specific violation is simply an example.

Id. at 1389. Appellant posits the second theory. She argues that Prince George's County has failed to maintain adequate internal checks on excessive use of force and has thereby allowed it to become a pattern.

We find the propriety of the county's summary judgment a closer call than the officers'. The county's written "standard" policies are exemplary, and are glowingly detailed by appellees. However, appellant cites numerous particular incidents of excessive force, including one that resulted in a jury verdict against officers and another

that was allegedly settled for a large amount.

Appellant also presents statistics showing that the percentage of excessive force complaints sustained through the county's administrative investigation has been minimal in comparison with the rather large percentage of other citizen complaints that have been sustained.

Finally, appellant points out that Commander's Information Reports (CIRs), which detail the results of internal investigations into every use of force, including dog bites, are kept for six months and then destroyed. Another county policy forbids taking photographs of dog bites. Appellant argues that these practices create the impression among officers that wrongdoing will not be documented.

Appellant will have more difficult problems of proof in her claim against the county. Nonetheless, if she can prove the numerous instances of excessive force she alleges, in conjunction with the circumstantial evidence of a "circle the tents" approach to police brutality complaints, we think a fair-minded jury could find that the county has a custom or practice of letting incidents of excessive force go unpunished.

The judgment is reversed, and the case is remanded for further proceedings.[2]

[2]The district court dismissed the state law claims by declining to exercise its pendent jurisdiction after dismissing the federal claims. Because the district court's jurisdiction is restored by our reversal, the dismissal of the state claims is also reversed, and they are reinstated.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ADA SANDRA KOPF :
Personal
Representative of
the Estate of
Anthony John Casella:

Plaintiff :

vs. : CIVIL NO. H-89-539

CORPORAL JOSEPH P.
WING, et al. :

Defendants :

MEMORANDUM OPINION

This civil action has been brought under 42 U.S.C. Section 1983 and the court's pendent jurisdiction. Plaintiff has here asserted that the constitutional rights of the decedent, Anthony John Casella (hereinafter "Casella"), were infringed when excessive force was used in his apprehension and arrest. Pendent claims

under state law have been alleged as well as claims under Section 1983.

The defendants are Prince George's County, Maryland, and Corporal Joseph P. Wing, Officer Steven Kerpelman and Officer James Skyrm of the Prince George's County Police Department, (hereinafter "Wing," "Kerpelman," and "Skyrm"). Following his conviction for the crime for which he had been arrested, Casella was sentenced to a term of imprisonment of seven years. He filed this suit while confined as a prisoner at Patuxent Institution, Jessup, Maryland[1].

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[1]When Casella died while in prison, Ada Sandra Kopf, his mother and the personal representative of his estate, was substituted as plaintiff in this action.

It is alleged that the police officers named as defendants maliciously and negligently assaulted Casella during his arrest for the crime of armed robbery in early 1988. Claims against the County are asserted under Section 1983 and under state law for the negligent hiring and retention of defendant Wing and for the negligent training of all defendants concerning the use of force.

Defendants have moved for summary judgment as to all counts of the complaint, contending that no issue of material fact exists and that all defendants are entitled to summary judgment as a matter of law. Extensive discovery has been undertaken in in this

case, including depositions of all three police officers.[2] Exhaustive memoranda and numerous and lengthy exhibits have been filed in support of an in opposition to the pending motions. Oral argument has been heard in open Court. For the reasons to be stated herein, the motions for summary judgment of all defendants will be granted.

I

The Claims

The complaint, which contains six separate counts, was filed on February 21, 1989. Count 1 alleges that the County police officers maliciously and intentionally assaulted Casella during his arrest on February 21, 1988. Count

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2The deposition of Casella was not taken before his death, and his version of the facts is therefore not a part of the record in this case.

2 alleges that the police officers negligently struck Casella in violation of recognized standards of care and that these defendants used excessive force during the arrest.

In Count 3, plaintiff alleges that the County negligently hired and retained defendant Wing although it had knowledge of his propensities towards any individual perceived as a threat to the police dog which accompanied him. Count 4 alleges that the County negligently trained the defendant officers in the proper use of nightsticks and in the use of force.

In Counts 5 and 6, plaintiff asserts claims against the three individual defendant and against the County under 42 U.S.C. Section 1983. Count 5 alleges that the individual

defendants violated Casella's Fourth and Fourteenth Amendment rights by their use of unreasonable and excessive force in apprehending and arresting him. Count 6 alleges that the County violated Section 1983 by its failure to train and supervise its police officers concerning the proper use of nightsticks, canines and force and in its failure to eradicate the use of excessive force by County police officers.

Defendants have moved for summary judgment as to all counts, claiming that no material facts are in dispute and that defendants are entitled to recovery as a matter of law. For the reasons stated herein, this Court finds and concludes that judgment as a matter of law should be entered in favor of all defendants as to all counts.

III

Facts

During the evening of February 21, 1988, Anthony John Casella participated in an armed robbery at a pizza shop located in College Park, Maryland. Employees of the pizza shop observed Casella driving away in a white van and gave the police a description of the vehicle, which was then sent out over the police radio. Fifteen minutes after the robbery, officers of the Hyattsville City Police Department observed the described vehicle at the intersection of 42nd Avenue and Jefferson Street in Hyattsville, Maryland. The officers made a traffic stop of the vehicle, whereupon the three occupants, a white female and two white males, exited the vehicle and fled.

One male occupant, Joseph Corcoran, was immediately apprehended by the Hyattsville police, but the remaining suspects could not be found and remained at large. The weapon used in the robbery was not recovered from the van nor from the apprehended suspect, and the police accordingly believed that the fleeing suspects were armed.

Prince George's County police then arrived at the scene and began a search for the remaining suspects. To that end, defendant Wing and his trained dog, known as "K-9 Iron," responded to the area and joined the search. Some minutes later, K-9 Iron located the suspects in the vicinity of the intersection of 42nd Avenue and Hamilton Streets. While leashed, the dog indicated that the suspects were hiding

behind a shed located in the backyard of a residence.

Defendant Wing then approached the shed, announced in a loud voice the presence of the K-9 dog and called on the suspects to surrender. When no one responded, Wing released the dog from its leash. Iron immediately ran to the back of the shed, and a loud female scream was heard. Wing followed Iron to one side of the shed, and defendant Kerpelman and Skyrm ran to the other side.

The two suspects were hiding in a narrow opening that measured approximately two feet wide between the shed and a stockade fence. On the side of the shed from which Iron had entered, a large post blocked the opening. Upon reaching this narrow opening, defendant

Wing observed a female standing in front of a male, both facing in his direction. Iron was biting the female's leg, and Casella, the male suspect, was kicking the dog in an attempt to force Iron to release her. Wing, with his service revolver drawn, shouted for the suspects to put their hands up; however, they did not comply. Iron then released the female suspect and began to bite Casella. The large post made entry from that side of the shed impossible, and Wing accordingly moved to the other side of the shed where Officers Skyrm and Kerpelman stood.

Meanwhile, Skyrm and Kerpelman had attempted to enter the area behind the shed from the other side, but a large wood pile partially blocked their way and made their footing unstable. As

Officer Skyrm approached the opening behind the shed, both suspects partially "bobbed out" from behind the shed. Skyrm, with his revolver drawn, pushed Casella on the shoulder, identified himself as a Prince George's County Police Officer and announced that both suspects were under arrest. Casella then lunged at Skyrm with both hands and came into close proximity to Skyrm's weapon.

When Skyrm saw that Casella did not have a weapon in either of his hands, he holstered his own fingers. Officers Skyrm and Kerpelman then grabbed Casella and began to struggle with him in an effort to pull him out from behind the shed. At some point during this struggle, the female suspect fell onto the wood pile, and Skyrm subdued her and

pulled her from behind the shed.

Once the female had been subdued and removed from the shed, Officers Kerpelman and Skyrm devoted their full attention to Casella who was struggling and squirming and continuing to resist arrest. Skyrm described Casella's actions as flailing motions testified and that Casella struck him several times. Kerpelman testified that Casella fought with the officers during the entire encounter. In his deposition testimony, Wing also stated that Casella continued to struggle throughout the encounter and that Casella struck him.[3]

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3Since Casella's deposition was not taken before his death, the deposition testimony of the three police officers concerning this physical encounter is uncontradicted.

Although Casella was struggling, Skyrm and Kerpelman managed to get hold of him. They each took one arm of Casella, who was then partially lying on the ground, and attempted to pull him out. Instead, Casella's jacket came off over his head and a bundle of money fell out, which Skyrm retrieved. As they struggled, Wing stepped over Casella out into the area behind the shed and retrieved the dog. Durinig the encounter, Iron had remained behind the shed and had been biting Casella. Once the dog released the suspect, the officers pulled Casella into the open yard and finally subdued him.

Kerpelman testified that he struck Casella twice with his flashlight during the struggle. He also testified that he struck Casella once or twice with his

blackjack, a weapon approximately 6-10 inches long with a flexible handle and a lead core wrapped in leather. Skyrm testified that he also struck Casella with his blackjack while struggling at the corner of the shed. Wing testified that he struck Casella while retrieving the dog behind the shed. Officers Kerpelman and Wing each testified that he struck Casella because of his concern that Casella might have a gun and because Casella was violently resisting.

Once Casella was subdued and handcuffed, he was kplaced on a stretcher and transported to the Prince George's County Hospital. The emergency room physician noted multiple hematoma, lacerations and the scalp and various dog bites. Casella was treated for his injuries and was released from the

hospital approximately one week later.

Casella subsequently pleaded guilty in the state court to armed robbery of the pizza shop in College Park. He received a sentence of seven years imprisonment[4] and was confined at Patuxent Institution when this suit was filed. Casella later died whille in prison as a result of injuries incurred during a fight with another inmate.

Police officers of Prince George's County undergo an initial 24-week period of basic training in which each officer receives instruction in the use of all police equipment. Such instruction includes methods to be applied in making

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[4]The sentence imposed was fifteen years with all but seven years suspended.

a physical arrest, human relations training for dealing with arrest situations, and methods whereby excessive force may be avoided when arrests are made. In addition, the Police Department holds periodic in-service training for experienced officers. During these training periods, officers are instructed in the use of all police weapons, including nightsticks and slapjacks.

The Manual of Rules and Regulations of the Prince George's County Police Department (hereinafter the "Manual") governs the conduct of police officers hired by the Department. This Manual contains regulations directed specifically to the amount of force permissible in a given situation. For example, Section 1/120 provides that

reasonable force may be used, but that in no instance may the use of force be more than necessary to achieve a lawful purpose. Section 3/901.20 provides that police officers shall refrain from using unnecessary force and shall not strike a prisoner except when defending one's self or others. This provision also cautions that the amount of force to be employed should be only that necessary to repel an attacker.

Section 1/185 of the Manual provides that the Department has the responsibility to investigate complaints against any officer in a fair and open manner and that the Department should discipline any officer found to have violated provisions of the Manual. Complaint forms are available to the public at police locations, and signs

are posted noting the availability of such forms. Each complaint against a county police officer is investigated and a written report containing the investigation's recommendation is filed. This report is then forwarded to the Office of the Chief of Police.

If a complaint is found by the investigator to have merit, it is forwarded to an administrative hearing board which hears evidence and then recommends a penalty to the Chief of Police. In the period from 1981-1987, County police made an average of 15,683 arrests per year, and some 282 complaints of excessive force were filed during this period. Of these complaints, the Internal Affairs Section of the Prince George's County Police Department sustained only thirteen, and

the Administrative Hearing Board subsequently sustained only five of those.

III

Summary Judgment Principles

One of the purposes of Rule 56 is to require a plaintiff, in advance of trial and after a motion for summary judgment has been filed and supported, to come forward with some minimal facts to show that a defendant may be liable under the claims alleged. See Rule 56(e). Moreover, "'[a] mere scintille of evidence is not enough to create a fact issue; there must be evidence on which a jury might rely.'" Barwick v. Celotex, 736 F.2d 946, 958-59 (4th Cir. 1984) quoting Seago v. North Carolina Theaters, Inc., 42 F.R.D. 627, 640 (E.D.N.C. 1966), aff'd, 388 F.2d 987

(4th Cir. 1967)). In the absence of such a minimal showing, a defendant should not be required to undergo the considerable expense of preparing for and participating in a trial. As Judge Winiter said in Bland v. Norfolk and Southern Railroad Company, 406 F.2d 863, 866 (4th Cir. 1969):

> While a day in court may be a constitutional necessity when there are disputed questions of fact, the function of a motion for summary judgment is to smoke out if there is any case, i.e., any genuine dispute as to any material fact, and, if there is no case, to conserve judicial time and energy by avoiding an unnecessary trial and by providing a speedy and efficient summary disposition.

In two cases decided in 1986, the Supreme Court has had an opportunity to clarify and expand the principles applicable to a trial court's consideration of a summary judgment

motion filed under Rule 56. Anderson v. Liberty Lobby, 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

In Anderson, the Supreme Court held that the standard for granting a summary judgment motion under Rule 56 is the same as that for granting a directed verdict under Rule 50, F.R. Civ.P. 477 U.S. at 250-51. The Court explained this standard as follows:

> [T]he judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252 (emphasis added).

In Catrett, the Court held that there is "no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim." 477 U.S. at 323 (emphasis in original). In reaching this result, the Court observed:

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." Fed. Rule. Civ.P. 1; see Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 467 (1984) . . . . Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner

> provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

Id. at 327.

The Fourth Circuit discussed the Supreme Court's holdings in Anderson and Catrett in Felty v. Graves-Humphrey Co., 818 F.2d 1126 (4th Cir. 1987). Judge Wilkinson emphasized in Felty that trial judges have "an affirmative obligation . . . to prevent 'factually unsupported claims and defenses' from proceeding to trial." Id. at 1128 (quoting Celotex, supra, 477 U.S. at 323-24).

Applying these principles to the facts of record here, this Court concludes that defendants' motions for summary judgment must be granted. Since the facts of record here "taken as a whole could not lead a rational trier of fact to find for the non-moving party,"

summary judgment in favor of all defendants is appropriate. Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

IV

Liability of the Individual Officers Under Section 1983

Plaintiff contends that Officers Wing, Kerpelman and Skyrm are liable under Section 1983 for violating Casella's Fourth Amendment rights by the use of excessive force in making the arrest on February 21, 1988. In determining whether the force used in making an arrest was reasonable, a court must carefully balance the nature and quality of the governmental intrusion on an individual's Fourth Amendment rights against the importance of the governmental interests alleged to

justify the intrusion. Tennessee v. Garner, 471 U.S. 1, 8 (1985) (citations omitted). The question presented is whether the totality of the circumstances in a particular case justifies the action taken. Id. at 8-9.

In its recent decision in Graham v. Connor, _____ U.S. _____, 109 S.Ct. 1865 (1989), the Supreme Court held that claims that law enforcement officials have used excessive force are to be reviewed under an "objective reasonableness" standard. Graham, 109 S.Ct. at 1867. The Court explained this standard in the following language:

> ...its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses and immediate threat to the safety

> of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

Graham, 109 S.Ct. at 1872.

The reasonableness of the actions of police officers in making an arrest is not to be judged with the 20/20 vision of hindsight; rather, a court must consider the fact that police officers are often forced to make split-second judgments in circumstances that are tense, uncertain and rapidly evolving. Id. Furthermore, this objective standard requires that an officer's actions be reviewed without regard to underlying intent or motivation. Id

When careful attention is given by this Court to the facts and circumstances of this particular case,

the Court concludes that the actions undertaken by defendants Wing, Kerpelman and Skyrm on the evening of February 21, 1988 fully comported with the applicable standard of reasonableness articulated by the Supreme Court in Graham. A severe crime, in armed robbery, had been committed. The fleeing suspects posed an immediate threat to the safety of the arresting officers and the general public. The firearm used during the commission of the crime had not been recovered, and the suspects were hiding in a shed located in a residential area late at night. The suspects were fleeing and were attempting to evade arrest by their flight, by hiding in a shed and by physically resisting efforts of the officer and the police dog to apprehend them. Even when found,

Casella continued to resist arrest by refusing to surrender although he knew that the police were in the area and had called on him to surrender.

Once Casella was located, he violently resisted arrest by fighting with the dog and the police officers. There can be little doubt that the resulting physical altercation involved circumstances which were "tense, uncertain and rapidly evolving..." Graham, supra at 1872. During this struggle, two of the officers believed that Casella was attempting to reach for a weapon. Since the crime was that of armed robbery, and since no weapon had been recovered, the police officers had every reason to believe that Casella not only possessed a weapon but would use it if given the opportunity. Lastly, the

location of the arrest, which was close quarters on uneven footing in a dark area, further supports the reasonableness of the officers' actions.

Significantly, the officers did not discharge their revolvers to subdue Casella. Indeed, Officer Skyrm returned his revolved to his holster when he ascertained that Casella was not armed. The officers decided to subdue Casella by the use of the trained police dog and manual force rather than by firing their weapons. Casella himself precipitated the dog bites and his other injuries by kicking at K-9 Iron and continuing to resist even after Iron then turned its attention from the female suspect to Casella. The dog bites and Casella's other injuries could have been avoided by Casella had he surrendered, as h e

had been called upon to do. During the struggle, Casella repeatedly struck the officers, who fought back, using their nightsticks but not their revolvers.

When all the pertinent factors are considered, this Court concludes that defendants wing, Kerpelman and Skyrm did not use excessive force in subduing and arresting Casella on the evening of February 21, 1988. When the Graham test is applied to the facts of this case, it is apparent as a matter of law that these three police officers acted in objectively reasonable manner when they subdued and arrested Casella. There was a need to use force; the amount of force used was reasonably related to such need, and the force used was applied by the police officers in a goof faith effort to arrest a dangerous suspect and

to protect themselves from harm during the altercation. See Bailey v. Turner, 736 F.2d 963, 970 (4th Cir. 1984); Justice v. Dennis, 834 F.2d 380, 382-383 (4th Cir. 1987). Moreover, the force used, even though it caused injury to Casella, was not so severe as to be disproportionate to the need presented. Id.

For all these reasons, summary judgment will be entered in favor of defendants Wing, Kerpelman and Skyrm as to Count 5 of the complaint.

V

Liability of the County Under Section 1983

In Count 6 of the complain, plaintiff seeks a recovery from the County under Section 1983. Plaintiff asserts that the County Police

Department has a custom or policy tolerating the use of excessive force, that the County failed to supervise the police officers in the use of K-9 dogs, nightsticks and other force and that the County failed to eradicate the use of excessive force by its officers. These failures are alleged to have led to the use of excessive force by defendants King, Kerpelman and Skyrm and to have cause the injuries sustained by Casella.

The short answer to plaintiff's claim against the County alleged in Court 6 is that the County police officers did not use excessive force in subduing and arresting Casella on February 21, 1988. This Court has concluded herein as a matter of law that the actions of the defendants Wing, Kerpelman and Skyrm were objectively

reasonable on the night in question. Since excessive force was not used, the County cannot be held responsible for tolerating its use, for failing to train and supervise these officers to prevent its use and for being deliberately indifferent of its use.

Even if the police officers had acted improperly, the County would still not be responsible for their actions. A municipality cannot be found liable in a Section 1983 under a theory of respondeat superior. Monell v. New York City Dep't. of Social Services, 436 U.S. 658, 694 (1978). The record here discloses no County policy, custom or usage which directly commanded these police officers to commit constitutional violations which led to Casella's injuries. Monell, 436 U.S. at 661.

Moreover, the individual defendants were not inadequately trained, and the record does not disclose that the County condoned for fostered a custom or usage which encouraged the use of excessive force in situations such as the one which arose here.

Even if unconstitutional activity on the part of the police officers had occurred in these unique circumstances (and the Court has specifically found otherwise), this event constituted merely a single incident which would not suffice to amount to a municipal custom and which would not constitute deliberate indifference by the County to unconstitutional activity. See Spell v. McDaniel, 824 F.2d 1380, 1391 (4th Cir. 1987). Plaintiff relies on evidence of the filing by citizens of complaints of

excessive force, on alleged deficiences in the investigation of the Casella arrest and on the fact that certain County records pertaining to canine encounters were routinely destroyed. The evidence in question is as a matter of law insufficient to raise a material issue of fact concerning the County's liability under Section 1983. The percentage of citizen complaints filed relative to the total number of arrests in the County is minuscule. Even if the investigation of the Casella incident were deficient, the evidence relied upon by the Plaintiff would hardy prove a policy, custom or usage condoning the use of excessive force. Nor does the fact that certain reports are routinely destroyed after a six-month period raise any inference of unconstitutional action

on the part of the County, particularly since permanent records of dog bites and apprehensions by the K-9 unit are maintained.

Finally, plaintiff can point to no evidence establishing the necessary causal link between the County's acts or failures and the specific injury in this case. See Buffington v. Baltimore County, Maryland, _____ F.2d _____ (4th Cir. July 21, 1990); Spell, supra, 824 F.2d at 1390. Plaintiff cannot show that any County custom or policy or any failure to train County police officers proximately cause the ultimate injury sustained by Casella. See City of Canton v. Harris, 109 S.Ct. 1197, 1206 (1989); Buffington, supra, slip op. at 21.

For all these reasons, summary judgment will also be entered in favor of defendant County as to Count 6 of the Complaint.

VI

Plaintiff's Claims Asserted Under State Law

In Counts 1 and 2 of the complaint, plaintiff seeks a recovery from defendants Wing, Kerpelman and Skyrm under state law for assault and battery and negligence. Count 3 alleges a claim under state law against the County for negligently hiring Wing and for negligently retaining him as a police officer, while Count 4 seeks recovery from the County under state law for negligently failing to train all three police officers. Plaintiff has asked this Court to exercise pendent

jurisdiction over these state law claims asserted by plaintiff against the three police officers and against the County itself. For the reasons stated herein, this Court will decline to exercise pendent jurisdiction over these state claims.

Pendent jurisdiction is a doctrine of discretion and not one of plaintiff's right. United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966). Moreover, the Supreme Court has expressly cautioned that "[n]eedless decision of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly, if the federal law claims are dismissed before trial . . . the state claims should be dismissed as well."

Id. at 726.

Here, the only federal claim against the three police officers and the only federal claim against the county are both being dismissed pursuant to defendants' motions for summary judgment. A majority of the courts which have considered the question have declined to exercise pendent jurisdiction over state claims when the federal claims have been disposed of prior to a full trial on the merits. See Hector v. Weglein, 558 F. Supp. 194, 204-205 (D. Md. 1982). Outlining the relevant factors to be considered in determining the appropriateness of a court's exercise of its discretion to decide pendent state claims, Judge Friendly in Kavit v. A. A. Stam & Co., 491 F.2d 1176 (2d Cir. 1974), said the

following:

> If it appears that the federal claims. . . could be disposed of on a motion for summary judgment under F.R.Civ.P. 56, the court should refrain from exercising pendent jurisdiction absent exceptional circumstances.

Id. at 1180.

No such exceptional circumstances exist here. Accordingly, defendants' motions for summary judgment must likewise be granted as to all of plaintiff's claims asserted against them in this case under state law.

VII

Conclusion

For all these reasons, the motion for summary judgment of defendants, Wing, Kerpelman and Skyrym will be granted in its entirety as to all claims asserted against them by plaintiff. The motion for summary judgment of defendant Prince George's County will likewise be granted in its entirety as to all claims asserted against the County by the plaintiff. An appropriate Order will be entered.

_____

Chief, United States
District Judge

DATED: _____

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ADA SANDRA KOPF, *
Personal Representative
of the Estate of *
Anthony John Casella

Plaintiff *

vs. * CIVIL NO.
H-89-539

CORPORAL JOSEPH P. WING, *
et al.

Defendants *

* * * oOo * * *

O R D E R

For the reasons stated in the Court's Memorandum Opinion of today, it is this ____ day of August, 1990, by the United States District Court for the District of Maryland,

ORDERED:

1. That the motion for summary judgment of defendants

Kerpelman, Skyrm and Wilson be and the same is hereby granted;

2. That the motion for summary judgment of defendant Prince George's County be ahd the same is hereby granted; and

3. That judgment is hereby entered in favor of all defendants, with costs.

Chief, United States
District Judge

NO. ____

IN THE
SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1991

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PRINCE GEORGE'S COUNTY, MARYLAND,

PETITIONER

v.

ADA SANDRA KOPF, PERSONAL REPRESENTATIVE
OF THE ESTATE OF ANTHONY JOHN CASELLA,

RESPONDENT

---

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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# BRIEF OF ANNE ARUNDEL COUNTY, MARYLAND,

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AS AMICUS CURIAE IN SUPPORT OF
PETITIONER

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IN THE
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OCTOBER TERM, 1991

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PRINCE GEORGE'S COUNTY, MARYLAND,

PETITIONER

v.

ADA SANDRA KOPF, PERSONAL REPRESENTATIVE OF THE ESTATE OF ANTHONY JOHN CASELLA,

RESPONDENT

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Anne Arundel County, Maryland, submits this brief as amicus curiae in support of the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit in Kopf v. Wing, 942 F.2d 265 (4th Cir. 1991). Consent of the

parties is not required pursuant to Supreme Court Rule 37.5.

INTEREST OF THE AMICUS CURIAE

The amicus County urges this Court to grant certiorari and review the decision of the Fourth Circuit because of the extraordinary and unwarranted impact it will have on the ability of local governments to defend against allegations of municipal liability under 42 U.S.C. Section 1983.

FILLER INFORMATION RE AMICUS

Since it is a "person" subject to liability under Section 1983, local governments, including the amicus County, are directly affected by the decision of the Fourth Circuit. In the context of an excessive force claim, the Court's decision sanctions the use of statistics showing the numbers and

dispositions of complaints against police officers for the use of force as a means of establishing, prima facie, the existence of a municipal policy or custom condoning the use of excessive force. By sanctioning the use of statistics alone as a means of establishing municipal liability, regardless of the contention which such statistics arose and the circumstances giving rise to each complaint, the decision of the Fourth Circuit makes it virtually impossible for trial courts to resolve the issue of municipal liability pre-trial, and will require the trial courts to conduct lengthy trials during which the validity of each previous complaint against a municipality's officers must be debated and adjudicated. Plenary review by this

Court is necessary to restore the logical approach to the determination of municipal liability and to see that the purposes underlying Fed. Rule Civ. P. 56 are enforced. The amici parties that will be harmed by the decision of the Fourth Circuit have a substantial and direct stake in the present case, and respectfully request this court to grant certiorari.

ARGUMENT

The decision of the Fourth Circuit Court of Appeals, reversing the trial Court's grant of summary judgment violates the principles of Fed. Rule Civ. P. 56. As this Court explained in Celotex Corp. v. Catrett, 477 U.S. 317 (1986), summary judgment is an integral part of the Federal Rules which are designed to "secure the just, speedy and

inexpensive determination of every action. Fed. Rule Civ. P. 1." Id. at 327.

It is well established that the party opposing the motion for summary judgment is entitled to all favorable inferences which can be drawn from the evidence. Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-159 (1970). In this case, however, the Fourth Circuit has allowed illogical and impermissible inferences to be drawn from the evidence proffered by Plaintiff in support of its claim against the County.

A municipality may not be held liable under 42 U.S.C. 1983 under a theory of respondeat superior. Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978). It can only be held liable as a "person" if it

exhibits "deliberate indifference" to constitutional rights by failing to stop a widespread pattern of abuse. City of Canton, Ohio v. Harris, ___ U.S. ___, 109 S.Ct. 1197 (1989).

The Fourth Circuit's decision would allow a Plaintiff to go forward with an extended and costly trial which cannot result in municipal liability as a matter of law. The written complaints which were in the record before that Court are inadmissible to prove the allegations in the complaint, they are only admissible to prove that complaints were filed. Even the Fourth Circuit recognizes that Plaintiff must prove "the numerous instances of excessive force she alleges" (Petition, APX. 17). Any sizeable municipality in the United States which is sued on a Monell theory

of condoning excessive force by police officers could be required to confront and defend between scores and hundreds of individual complaints as a part of its defense to every suit filed against it.

The decision will result in a trial which is a series of mini-trials of each complaint. Plaintiff does not offer any evidence of the use of excessive force other than the complaints themselves and there was no evidence in the record before the Fourth Circuit that any of the complaints was not thoroughly investigated or appropriately resolved. Therefore, the case should not be allowed to go forward to trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). In addition to the evidentiary problem, the proposed procedure suffers from the

same defects this Court found to exist in the District Court trials in Rizzo v. Goode, 423 U.S. 362 (1976). This Court stated

> The findings of fact made by the District Court at the conclusion of these two parallel trials ... disclose a central paradox which permeates that court's legal conclusions. Individual police officers not named as parties to the action were found to have violated the constitutional rights of particular individuals, only a few of whom were parties plaintiff.

Id. at 371. If the case proceeds to trial on this basis, and the allegation of certain complaints are "proved" to be true, this would not arise to the level of a pattern of the use of excessive force or the condemnation of it by the County. If statistical evidence is all that is required to go forward to trial against a municipality, then no system

for investigating and adjudicating complaints could be designed by a municipality to deter use of excessive force by police officers which would satisfy Constitutional requirements. Since complaints are encouraged by the defendant County this will cause an enormous increase in the workload of the trial Court because even frivolous complaints would take on significance. The Fourth Circuit's decision requires numerous individual officers to justify their actions in a trial in which they are not the defendants and the complainants are not the plaintiffs. And if at a trial some number of complaints were found to have merit, the trial Courts would be without guidance as to any number or percentage of meritorious complaints which is

necessary to establish a viable claim, as there must be more than isolated instances of excessive force to prove a pattern. City of Oklahoma City v. Tuttle, 471 U.S. 808, 824 (1985).

Secondly, there is no evidence that the process for handling complaints by defendant County is inadequate. Both the District Court and the Court of Appeals found the County's policy to be constitutionally valid on its face. The statistic that plaintiff proffers to prove the inadequacy of the system is that a smaller percentage of excessive force complaints are sustained than other disciplinary complaints against police officers. This statistic is meaningless. All complaints of excessive force are closely investigated by Prince George's County in compliance

with State law. Even if Plaintiff were capable of proving that a small number of incidents occurred in which excessive force was used and that the officers were not disciplined, this is not enough to establish a pattern so widespread that the officials had constructive knowledge of it. At most it would arise to negligent administration, not deliberate indifference. The test for municipal liability under Section 1983 is a stringent one. The District Court was correct in ruling that Plaintiff's evidence was insufficient as a matter of law to raise an issue of material fact concerning the County's liability under Section 1983.

law to raise an issue of material fact concerning the County's liability under Section 1983.

## CONCLUSION

For the foregoing reasons, the Court should issue a writ of certiorari to review the decision of the Fourth Circuit.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of this Petition were mailed first-class, postage prepaid on this 2nd day of January, 1991, to Michael O.

Connaughton, Esquire, Room 5121, Office of Law, County Administration Building, Upper Marlboro, Maryland 20772; and to Terrell N. Roberts, III, Esquire, 6801 Kenilworth Avenue, Suite 202, Berkshire Building, Riverdale, Maryland 20737.

John F. Breads, Jr.